UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

WILLIAM BEAUMONT HOSPITAL,

Respondent,

and Case No. 07-CA-093885

JERI ANTILLA, an individual

Charging Party,

RESPONDENT'S BRIEF IN OPPOSITION TO EXCEPTIONS

John P. Hancock (P23653)
Rebecca S. Davies (P52728)
Butzel Long, a professional corporation
Counsel for Respondent William Beaumont Hospital
150 W. Jefferson Avenue, Suite 100
Detroit, Michigan 48226
(313) 225-7028
(313) 225-7080 (fax)
hancock@butzel.com
davies@butzel.com

Dated: May 7, 2014

Table of Contents

Index Of Authorities

NRLB RULES **PAGE(S)**

Introduction

In October 2011, the new Family Birth Center manager, Patricia Knudson, was faced with the following situation: Anonymous notes were being slipped under her door warning her of the bullying environment she was now managing. New nurses were afraid to come to work. A survey of the Family Birth Unit indicated that 40% of the staff had experienced bullying at work. New nurses were afraid to ask questions. Then in December 2011, a newborn died, one of the causes being linked to the fear of newer nurses to ask for help.

The Employer needed to act. The Employer tried to address these issues by training; however, that was unsuccessful. The pervasive bullying atmosphere continued. In October 2012, a RN recruit quit her self-described dream job because it was too difficult to work with the other nurses on the unit. An extensive investigation revealed that the newer nurses universally pointed to just a couple of people responsible for this hostile environment: Charging Party Antilla and Charging Party Brandt.

This is not a case where Section 7 rights were violated. This is a case where the well being of newborns and mothers would be in jeopardy if Employer refused to take action. In rightfully taking action, the Employer did not violate any provision of the National Labor Relations Act and the Administrative Law Judge correctly dismissed the charges as to both Charging Party Antilla and Charging Party Brandt.

Relevant Facts

A hospital is no place for bullies. Instead, the critical nature of the healthcare services provided by the Employer requires employees who are willing to cooperate and assist others.

Charging Parties' unit had a reputation known throughout the hospital that it had a mean culture. Indeed, in 2011 a couple of nurses openly shared with the Director of Maternal Child Health their reluctance about transferring to that unit. (Anne Ronk, Trial Testimony, pp. 511-12). Within days of becoming the new manager, Patricia Knudson received anonymous notes under her door identifying the bullying issues and specifically naming the bullies, which included both Charging Parties. (Patricia Knudson, Trial Testimony, pp. 611-614); (Respondent's Exhibit Numbers 26-28). Instead of hastily responding, Ms. Knudson tried to

survey the unit to determine the extent of the problem. *Id.* at 615-16. That survey indicated that 40% of the staff had experienced bullying at work and that 61.1% of the staff wished that management would address the negative behaviors on the unit. (Respondent's Exhibit 29, Bullying Survey). Given such alarming results, Ms. Knudson decided that training was necessary. *Id.* at 619.

Prior to any training being conducted, however, a tragic event occurred – the unit lost a baby. *Id.* at 619-20. One of the identified causes of this sentinel event was the fear of newer nurses to ask for help. (Amy Giannosa, Trial Transcript, p. 454); (Patricia Knudson, Trial Transcript, p. 621); (Anne Ronk, Trial Transcript, p. 544). The investigation showed a concern by nurses that they would be mocked, laughed at or ridiculed if they asked a question and, as a result, they stopped asking for help. (Patricia Knudson, Trial Transcript, p. 621). A mandatory four-hour training seminar was presented in February of 2012. (Respondent's Exhibits 30-39).

Unfortunately, even after training the Charging Parties' conduct never changed. Instead, each continued to engage in divisive activities which significantly affected the competency of the care being provided as well as the turnover and morale of the staff. Indeed, such conduct contributed to the loss of a new employee. "Newer nurses did not feel comfortable going to the senior nurses on the unit, because they felt that they would be mocked or belittled or made fun to other nurses on the unit." (Amy Giannosa, Trial Transcript, p. 485). The Employer could not, and should not be required to, tolerate such actions. (Amy Giannosa, Trial Transcript, p. 474). Given the severity of the information shared by Tina Wadie and the other nurses, the Employer had just cause to terminate the Charging Parties. (Tonyie Andrews-Johnson, Trial Transcript, p. 587); *see also*, (Amy Giannosa, Trial Transcript, p. 474); (Anne Ronk, Trial Transcript 543-44).

A. Employment History of Charging Party Antilla

Despite Charging Party Antilla's representations to the contrary, the complaints raised in the fall of 2012 were not the first time the Charging Party's negative behavior was addressed with her. In September 2011, Anne Ronk (Director of Maternal Child Health) addressed with the Charging Party that newer nurses

had complained she was being negative on the unit and about her lack of engagement in her role. (General Counsel's Exhibit 4, Plan for Performance Improvement, p. 1). Although Charging Party Antilla denied that her temperament had ever been previously discussed by management, she later testified that Anne Ronk shared with her in September 2011 that she needed to speak more calmly. (Jeri Antilla, Trial Transcript, p. 163).

In January and February of 2012, the nurses in the Family Birth Center were required to attend a 4-hour educational Safety Symposium to help improve teamwork on the unit. (Respondent's Exhibits 38-39, Summary of Safety Conference and 1/30/12 Sign-In Sheet). This was part of a program initiated the prior year because of a sentinel event that resulted in the death of a newborn. At these educational sessions, clear expectations were set for what is appropriate behavior and communication amongst staff: There would be no more bullying or a lack of communication between the nurses because of a lack of collaboration. (Respondent's Exhibits 30-37, PowerPoint Presentations). Sadly, Charging Party Antilla testified that she did not remember any issues of bullying being discussed during that training. (Jeri Antilla, Trial Transcript, p. 136). That admission, however, is not too surprising given that Ms. Knudson testified that Ms. Antilla was disinterested, texting, talking to others and repeatedly leaving during the presentations. (Patricia Knudson, Trial Testimony, p. 639).

Unfortunately, not only had the Charging Party's behavior discouraged new staff from communicating their concerns, it even resulted in a new staff member submitting her resignation without notice.[1] Specifically, on October 23, 2012, Tina Wadie quit her self-described "dream job" because of the lack of support by her co-workers. (Respondent's Exhibit 9, Resignation Correspondence). Ms. Wadie sent an unsolicited e-mail indicating "I do not believe I have thick enough skin to deal with all of the strong personalities involved with this position." (Respondent's Exhibit 9, Resignation Correspondence); (Amy

[1] Charging Party Antilla was previously employed at two others hospitals but that employment only lasted six and eight months each. (Jeri Antilla, Trial Transcript, pp. 175, 177).

Giannosa, Trial Transcript, p. 448).[2] Pointing specifically to the senior nurses, she questioned "how do I go to someone who does not want me on the unit?" (Respondent's Exhibit 9, Resignation Correspondence). During the exit interview with Human Resources, Tina Wadie specifically identified the Charging Parties. (Amy Giannosa, Trial Transcript, p. 449). One of the issues raised was that Charging Party Antilla chastised Ms. Wadie that she was taking too long and stated that there was a "right way" and a "night way". (Tonyie Andrews-Johnson, Trial Transcript, p. 575). This troubled the Employer because things should be done the same whether it's the day or night shift. *Id.* Even Ms. Post testified that there was no difference in the role of the nurse between the day shift and the midnight shift. (Lori Post, Trial Transcript, p. 111).

After this resignation, management met to discuss the issues raised by Ms. Wadie. Despite the seriousness of the allegations raised, the Employer did not rush to judgment. Instead, it determined that an investigation was prudent. As such, the Human Resources representative tasked the midnight associate nurse manager to interview the newer nurses. (Amy Giannosa, Trial Transcript, p. 462). In so doing, Human Resources specifically directed the nurse manager not to identify any names. (Amy Giannosa, Trial Transcript, p. 463).

During the investigation, numerous staff members once against specifically identified Charging Party Antilla as exhibiting "negative, intimidating and bullying behavior". (Respondent's Exhibit 13, Investigation Summaries); (General Counsel's Exhibit 4, Plan for Performance Improvement, p. 1). Charging Party Antilla was described as "the "ring leader" of negativity on the unit." *Id.*

On November 5, 2012, Alissa Amlin (Associate Nurse Manager, Family Birth Center/Antepartum) and Tonyie Andrews-Johnson (Associate Nurse Manager, Family Birth Center) met with the Charging Party to discuss her conduct. (Respondent's Exhibit 25, November 5, 2012 Meeting Summary). She denied being negative or bullying the newer RNs. *Id.* The following Plan for Improvement was given to her:

---

[2] The allegations contained in this e-mail were so serious that Human Resources advised various vice-presidents, the HR Director and recruiters of the circumstances and the resulting investigation. (Amy Giannosa, Trial Transcript, p. 453).

> Jeri has failed to take accountability for her actions and did not appear to be receptive to the feedback she was provided. Jeri dismissed the concerns that her peers brought forward and appeared more concerned about confronting them.
>
> It is the intention of Beaumont Hospitals to foster effective working relationships amongst all staff members in order to provide and maintain high quality and safe patient care. It is an expectation that employees will promote and maintain a professional environment in which all individuals are treated with dignity and respect. Conduct on the part of a Beaumont employee that is inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships is not tolerated. The Hospital has zero tolerance for such behaviors.
>
> Furthermore, in spite of counseling and setting clear expectations of the Beaumont Standards, management has continued to receive non-solicited complaints from co-workers and Jeri has continued to exhibit behaviors that work against the principles of nursing, resulting in an environment that is intimidating, harassing, and negative on the unit.

(General Counsel's Exhibit 4, Plan for Performance Improvement, p. 2). Given her lack of accountability, the Employer decided it had no choice but to discharge the Charging Party. (General Counsel's Exhibit 4, Plan for Performance Improvement, p. 1).[3]

B. Employment History of Charging Party Brandt

Charging Party Brandt's negative behavior began before she was working in the unit. Indeed, complaints about Charging Party Brandt's negative attitude date all the way back to 2006. (General Counsel's Exhibit 5, Plan for Performance Improvement, p. 1).

In September 2012, Charging Party Brandt attended a mandatory surgical tech meeting at which expectations, including improving teamwork, were discussed. (Respondent's Exhibit 41). At that meeting, the Employer made it clear that no bullying behavior would be accepted. (Tonyie Andrews-Johnson, p. 600).

Despite the department meeting, Charging Party Brandt's negative behavior continued. An example of such a negative encounter was reported on October 29, 2012. "Alyssa upset about Deanna Brandt in the OR this morning. A patient was having a stat c-section. Deanna was yelling at her regarding supplies. Specifically, she gave Deanna an extra syringe that was not needed, Deanna yelled at her that she didn't need

[3] The Employer's Program for Performance Management policy allows for immediate termination for improper conduct. (General Counsel's Exhibit 4); (Amy Giannosa, Trial Transcript, pp. 458-59).

it in front of everyone in the OR." (Respondent's Exhibit 13, Investigation Summaries - 10/29/12 Summary of Meeting between Tonyie Andrews-Johnson and Alyssa Head).

Charging Party Brandt's behavior was a contributing factor towards the resignation of a new nurse. In an unsolicited e-mail, Ms. Wadie stated "I fear going to work each night that my patient will have to go back for a section, because the OR is just brutal." (Respondent's Exhibit 9, Resignation Correspondence); (Amy Giannosa, Trial Transcript, p. 448). During her interview with Human Resources, Ms. Wadie described Charging Party Brandt as "nasty", "huffy", "not nice at all," belittling about everything", "sarcastic", "condescending", "rolling eyes" and "shrugging her shoulders". (Amy Giannosa, Trial Transcript, pp. 450-451). Indeed, Ms. Wadie shared "[d]oesn't matter what you do, she always has negative comment." (Amy Giannosa, Trial Transcript, pp. 450-451).

Similar to Charging Party Antilla, Charging Party Brandt was also identified by several staff members in the investigation conducted by Tonyie Andrews as exhibiting "mean, nasty, intimidating and bullying behavior."[4] (General Counsel's Exhibit 5, Plan for Performance Improvement, p. 1); (Respondent's Exhibit 13, Investigation Summaries). Examples of her inappropriate behavior included:

- During a c-section with Deanna in the Operating Room (OR), she yelled at a RN regarding the supplies. The inappropriate communication was witnessed by several staff members in the OR. The RN stated she felt intimidated because Deanna yelled, demanded things, and made her feel like she is doing something wrong. The RN explained that Deanna "yells at the RNs like they don't know what they are doing or aren't doing it fast enough for her."

- During a c-section in the OR with Deanna, a RN reported that someone placed trash in a linen bin. Deanna instructed the RN "to sort through the linen and get the trash out or she will write her up". Additionally, this RN reported that several of her peers approached her the next week and said that Deanna told them "she doesn't know what she is doing and hates being in the OR with her." Additionally, the RN stated Deanna continued to make snide comments to her. For example, Deanna stated, "they let you work out here," when the RN was working in the Triage area. Another time Deanna stated, "they are going to let you work dayshift" when she found out the RN was transferring to days.

[4] The Administrative Law Judge rejected the General Counsel's argument that questioned the investigation because only some, and not all, of the new nurses were interviewed, and some of the interviewees were not new nurses. (ALJ Decision, p. 13, lines 37-39). The Administrative Law Judge found that "positive or neutral reports would not cancel out the negative ones already received, and there was not a scintilla of evidence presented that Andrews-Johnson improperly selected interviewees or that any interviewee's report was improperly influenced." (ALJ Decision, p. 13, lines 39-42).

- Multiple RNs reported to management that their overall interaction with Deanna is unpleasant, negative, belittling, and intimidating. The RNs describe Deanna as "mean and nasty", "yells at RNs and demands that they stop what they are doing and get whatever she wants", and "rolls her eyes, huffs and puffs when she is asked a question or her requests are not completed fact enough". Additionally, several RNs stated that they have witnessed Deanna "purposely being mean and intimidating" to the newer RNs on nights."

(General Counsel's Exhibit 5, Plan for Performance Improvement, p. 1).

The Employer decided it had no choice but to discharge Charging Party Brandt and issued the Plan for Performance Improvement. (General Counsel's Exhibit 5, Plan for Performance Improvement, p. 2). Accordingly, Charging Party Brandt was terminated on November 8, 2012, the day before the Charging Party Antilla was terminated.

C. Similar Treatment of Other Bullies

The leadership team in the Family Birth Center had been intensely working on changing the environment of the unit, most particularly by adding nurse staffing resources and improving the communication and culture on the unit. Given these efforts for improvement, it would not tolerate bullying any longer and took action to remedy this problem.

As testified by Human Resources Representative Amy Giannosa, there were numerous other examples where the Employer disciplined other employees for bullying-type behavior:

Employee/Position	**Infraction/Discipline**
Quiena Down, Surgical Technologist	In November 2012, Ms. Down made comments to a physician in an aggressive manner with strong body language. As a result, Ms. Down received written discipline for poor job performance.
Madonna Ladouceur, FBC RN	Received two complaints about Madonna's behavior and attitude. She was described as intimidating and mean spirited. She received verbally counseling and voiced an intention to be more conscious of the way her comments and behaviors are perceived.
Clinton Burke, Nursing Assistant	Mr. Burke repeatedly engaged in disruptive and intimidating behavior. As a result, he has been removed from any duties on the 8th Floor and received a 3-day suspension.

Sheryl Dalton, Staff CRNA- Anesthesia	In September 2012, Ms. Dalton engaged in unprofessional behavior by inappropriately touching an anesthesia student in an attempt to critique the student's performance. As a result, Ms. Dalton received a 2-day suspension and apologized to the student.
Sheryl Dalton, Staff CRNA- Anesthesia	In December 2012, Ms. Dalton engaged in repeated disruptive behavior, including using profanity on the Unit floor. As a result, Ms. Dalton received written discipline (Level II).
Rachelle Dowdell Clinical Nurse II, Gyn	Ms. Dowdell engaged in incidents of inappropriate and unprofessional behavior with her co-workers. As a result, Ms. Dowdell received written discipline (Level II).
Diana Glinski CN I, Nursing Family Birth Ctr	Ms. Glinski was identified as a bully on the FBC unit. On March 26, 2012, management suspended her without pay pending an investigation. Ms. Glinski was scheduled to meet with management to discuss the results of the investigation (in which employer planned to issue termination paperwork) at 1 p.m. on March 30, 2012. However, on the morning of March 30, 2012, Ms. Glinski submitted a resignation letter.
Nerrisa Hallett, OB Assistant	Ms. Hallett repeatedly used offensive and vulgar language on the unit floor, talking about her co-workers, patients, and patients' families. As a result, Ms. Hallett was terminated in February 2011.
LaDonna Hardrick, R.N.	Ms. Hardrick, was released from probation due to the rude and inappropriate behavior she displayed to HR staff members. As a result, Ms. Hardrick was terminated in July 2012.
Lori Post Family Birth Ctr	Ms. Post was mentioned during an investigation of negative/bullying behaviors (never started, just participated or supported). Ms. Post was verbally counseled in November 2012 and she apologized for her behavior at that time.
Linda Rafferty RN, 2 NC PACU	Ms. Rafferty engaged in inappropriate and disruptive behavior, including using profanity on the unit floor. As a result, Ms. Rafferty received written discipline (Level II).
Michelle Wonk Family Birth Ctr	Ms. Wonk was verbally counseled regarding her behaviors and attitude in March 2012. She expressed remorse and a willingness to practice self-reflection and consciously alter these behaviors.

(General Counsel's Exhibit 25(a) – (l)); (Amy Giannosa, Trial Testimony, p. 488). Indeed, including both of the Charging Parties, there were nine individuals from the Family Birthing Center that had also been disciplined. (Amy Giannosa, Trial Transcript, pp. 488-92).

The foregoing demonstrates that the Employer does not tolerate any behavior that is inappropriate or detrimental to patient care, hospital operations, or that impedes harmonious interactions and relationships. Most importantly, the foregoing demonstrates that the Employer did not single out either Charging Party Antilla or Charging Party Brandt because of any alleged concerted activities, but, instead, disciplined them as they did other similarly situated employees.

Legal Argument

A. The Administrative Law Judge Correctly Dismissed the Charges of Charging Parties Antilla and Brandt.

The Amended Charge, filed by Charging Party Jeri Antilla on January 15, 2013, alleges that the Employer discharged her and Charging Party Deanna Brandt "for engaging in activities with other employees for mutual aid and protection on matters concerning terms and conditions of employment." The Administrative Law Judge correctly dismissed these charges as the Employer did not violate any provision of the National Labor Relations Act.

1. The Administrative Law Judge Correctly Held That the Employer Lawfully Discharged The Charging Parties.

The testimony at trial demonstrated that "Antilla and Brandt were terminated because there is no place for bullying and intimidating behavior in a setting such as labor and delivery where teamwork is critical. (Tr. 544.)" (ALJ Decision, p. 12, lines 40-42). Bullying and intimidating behavior "impeded open communication, the freedom to ask questions, or to ask for help that can put a patient's safety at risk. (Tr. 544.)." (ALJ Decision, p. 12, lines 43-44). The Administrative Law Judge found that "the reasons that management has given for the terminations are significant and credible, and were sufficient to justify the terminations." (ALJ Decision, p. 11, lines 29-30).

The Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *NLRB v. Jones & Laughlin Steel Corp.*, 1 LRRM 703, 714 (U.S. 1937). An employee "may be dismissed for any reason or no reason at all, so long as union activity is not the basis for the discharge." *Pepsi-Cola Bottling Co.*, 268 NLRB 112, 115 LRRM 1103, 1104 (1984); *see, e.g., Whittaker Knitting Mills*, 207 NLRB 1019, 1023 (1973) ("so far as this Act is concerned, an employer may discharge employees for any reason or no reason, so long as the discharge is not to infringe on the rights guaranteed by the Act …"). The Act, in other words, does not protect employees from "their own misconduct." *Guardian Ambulance Service*, 228 NLRB 1127 (1977). "If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union." *NLRB v. Birmingham Publishing Co*., 262 F.2d 2, 9, 43 LRRM 2270 (5th Cir. 1958). The fact that an employer may be "glad to be presented with the opportunity" to discharge an employee, who was a union activist, for a legitimate business reason is "legally inconsequential." *A&T Mf'g. Co.*, 276 NLRB 129, 120 LRRM 1202, 1203 (1985), *citing, Klate Holt Co.*, 161 NLRB 1606, 1612, 63 LRRM 1482 (1966).

The NLRB "was not chartered by Congress to right every perceived industrial wrong or to sit in judgment upon an employer's usual exercise of basic management prerogatives to hire and fire." *R-W Service System*, 243 NLRB 1202, 101 LRRM 1582, 1583 (1979). It is "not the Board's function to substitute its own judgment for that of an employer as to what constitutes reasonable grounds for discharge." *Mason & Hanger-Silas Mason Co.*, 270 NLRB 71, 116 LRRM 1073, 1074 (1984) (footnote deleted). "The fact that the Board disagrees with an action by the employer is of no importance." *Sioux Quality Packers v. NLRB*, 581 F.2d 153, 156, 98 LRRM 3128 (8th Cir. 1978). The Act "does not allow (the) Board to act as a 'super-employer' in derogation of the right of the employer to select its employees or discharge them." *NLRB v. First Nat'l. Bank of Pueblo*, 623 F.2d 686, 693, 104 LRRM 3031 (10th Cir. 1980).

As demonstrated by a factually similar decision in *Correction Corp. of America*, 187 LRRM 1129 (2009), the Board found that an employer was well within its rights, and did not violate the Act, when it terminated an employee that exhibited bully-like behavior. Specifically, in *Correction Corp.*, the Board held

that the Employer properly terminated an LPN that engaged in antagonistic behavior which caused two registered nurses to resign and threatened the employer's contract with a correctional facility. The facts in *Correction Corp.* are analogous to the instant case and worthy of thorough examination.

The charging party in *Correction Corp*. was described as "unprofessional", shouted at her co-workers and was reported that her "daily … uncivil conduct" created a "toxic work environment" in the medical department that brought about "low morale, stress, and interfere[d] with teamwork, safety, and meanwhile increasing staff turnover." *Id.* at 1130. Meanwhile, an inmate at the correctional facility died triggering an investigation. *Id.* In response, the employer conducted a training seminar to identify and alleviate employee conflict. *Id.* Yet, even after the training, the charging party's conduct continued to negatively impact the department. The medical department was still found be "anxious, hostile, and unprofessional" due in part to the charging party's behavior which was described as the "biggest, baddest bulldog that just barked all the time in your face and would never go away." *Id.*

The Board in *Correction Corp.* recognized that the employer understandably became more diligent in addressing misconduct after the death and due to the fact its contract was in jeopardy. *Id.* at 1132. The Board concluded that the charging party's "misconduct was a severe detriment to the facility because it directly interfered with the respondent's ability to employ RNs and provide proper medical care for its inmates, objectives that were paramount in the Respondent's efforts to retain the contract." *Id.* Accordingly, the Board held that the employer's termination did not violate the Act.

Here, similar to *Correction Corp.,* the Charging Parties were identified as exhibiting "mean, nasty, intimidating and bullying behavior." (General Counsel's Exhibits 4 and 5). Also, similar to *Correction Corp.*, both Charging Parties were, in part, responsible for the resignation of a new RN. (Amy Giannosa, Trial Transcript, p. 449). Further, similar to *Correction Corp.,* the Employer here experienced a tragic death which resulted in an investigation. In finding that the Employer's reasons for termination "are significant and credible, and were sufficient to justify the terminations, the Administrative Law Judge correctly recognized this sentinel event:

> The hospital had experienced an unexpected infant death, and this was found to be due, at least in part, to nurses not cooperating with each other, not communicating effectively with each other. If new or inexperienced staff does not feel comfortable asking for assistance or asking questions for fear of being mocked, or humiliated, or yelled at, then there is indeed increased risk to patients. Whether one characterizes the conduct as bullying or negative or demeaning is immaterial; it is the underlying conduct that is at issue, not the characterization.

(ALJ Decision, p. 11, lines 32-38). In response, Beaumont, like the employer in *Correction Corp.,* administered teamwork training. Unfortunately, again similar to *Correction Corp.,* the bullying tactics of the Charging Parties did not end. Accordingly, given the similarity of the facts, the Employer, like *Correction Corp.,* must be found to have acted within its legal rights and did not violate the Act.

The Administrative Law Judge rejected General Counsel's interpretation that allegations of negativity equated to protected concerted activity. (ALJ Decision, p. 11, lines 31-32). In so doing, the Administrative Law Judge recognized the repeated instances of bullying reported by various employees:

- "Knudsen testified to being advised of bullying problems within her first month in her current job, in October 2011. (R. Exhs. 26, 27, 28.)" . (ALJ Decision, p. 11, lines 31-32).

- "An environmental survey (culture of safety survey) was then conducted. (Tr. 611, 615–618; R. Exh. 29.) Knudsen characterized negative behavior as intimidation, mocking, excessive criticism, hoarding knowledge; and behaviors that are not conducive to a safe environment. (Tr. 618.)" (ALJ Decision, ps. 11 – 12, lines 41-42 and 01-02).

- "The ensuing investigation into the sentinel event showed that communication, handoffs, and interpretation of fetal tracing, were significant contributing factors. (Tr. 621.)" (ALJ Decision, p. 12, lines 05-07).

- "A 4-hour mandatory training, or safety symposium, was presented for the nurses, to address those issues. (Tr. 622; R. Exhs. 30, 32, 33, 34, 36, 37, 38.) It was offered four times in January and February 2012." (ALJ Decision, p. 12, lines 07-08).

- "Four culture of safety surveys were conducted in 2012, to see whether any progress had been made. (Tr. 634.)" (ALJ Decision, p. 12, lines 11-12).

- "Then, despite these efforts, in October 2012, Wadie quit her job and gave, as one of the reasons, the treatment of her by other staff." (ALJ Decision, p. 12, lines 15-16).

The Administrative Law Judge opined that "Giannosa credibly explained that negative behavior meant the negative attitude exhibited toward the new nurses, belittling, condescending, and demeaning behavior. (Tr.

475.)" (ALJ Decision, p. 12, lines 23-24). The Administrative Law judge correctly concluded "[t]hat is entirely distinct from complaining about working conditions." (ALJ Decision, p. 12, line 25).

The Administrative Law Judge correctly held that the Employer lawfully terminated the Charging Parties:

> Both Antilla and Brandt were terminated due to inappropriate conduct toward other employees, having nothing whatever to do with workplace grievances. They failed to interact with other staff in a professional manner, that was part of the cause for Wadie's resignation, and were uncooperative with other staff, worsening the situation about which they were purportedly so concerned. Neither Antilla nor Brandt acknowledged any awareness of the effect of their behavior and comments on the new nurses.

(ALJ Decision, p. 12, lines 27 – 32).

a. Charging Party Antilla was Lawfully Terminated.

This is not a case where the Employer simply alleged that an employee engaged in bullying or intimidating conduct without any background evidence or supporting facts. The Administrative Law Judge correctly recognized that prior to termination the Charging Parties "were given descriptions of the conduct and statements at issue, and were given the opportunity to ask questions." (ALJ Decision, p. 13, lines 19-20). Rather, the written documentation and testimony presented at trial demonstrates the various issues raised by multiple co-workers about Charging Party Antilla's "mean, nasty, intimidating and bullying behavior." (Respondent's Exhibit 13, Investigation Summaries).

Examples of Charging Party Antilla's inappropriate behavior included:

- talks and acts negatively towards the newer RNs;
- "rolling her eyes and whispering to other senior RN's when a new RN asks her a question";
- "if Jeri has a bad day, stay out of her way";
- when asked to assist a newer nurse, the Charging Party instead chastised the requesting nurse that she should have ensured she had the proper supplies in her room and that she needed to be better prepared; and
- Jeri will help a new RN but after the fact, she talks about them so the newer RNs feel apprehensive about asking her questions.

(General Counsel's Exhibit 4, Plan for Performance Improvement, p. 1).

This was not just a complaint made by one co-worker but, instead, these negative comments were repeatedly echoed by many throughout the unit.[5] (Respondent's Exhibit 13, Investigation Summaries). As Amy Giannosa testified, the Employer would not just take one person's word, but would investigate. (Amy Giannosa, Trial Testimony, p. 49). Charging Party Antilla's attempt at trial to deny or otherwise excuse her conduct was ineffective.

First, Charging Party Antilla claimed that she was "taken out of context" relative to prior incident involving a stool.[6] Specifically, the Discipline described the incident as follows:

> Another situation involving Jeri occurred a few weeks prior. Jeri was covering the Charge RN and the RN asked her to bring a step stool in a patient's room, who was admitted and going into precipitously delivery. The RN was unable to leave the patient's room. Jeri told this RN that she should have the proper supplies in her room and that she needed to be better prepared. Later in the shift, another co-worker approached the RN and said that Jeri made comments at the nursing station about how unprepared she was for the delivery.

(General Counsel's Exhibit 4, Plan for Performance Improvement, p. 1). However, in an attempt to demonstrate that this statement was "taken out of context", Charging Party made it perfectly clear by her

---

[5] Charging Party Antilla attempts to rely upon the fact that she because was once assigned as a Charge Nurse, and once assigned as a Preceptor that this somehow demonstrates she is a good employee or should not considered to be a bully or intimidating to the newer nurses. The Administrative Law Judge found that such "good performance does not outweigh the bad judgment she exercised in her conduct toward the new nurses." (ALJ Decision, p. 13, lines 33-35). Specifically, the Administrative Law Judge found that any good conduct was "immaterial since the terminations were not based on performance, but on conduct." (ALJ Decision, p. 13, lines 25-26):

> The management team looked at their performance but it did not outweigh the misconduct. It appears that Antilla exhibited a very different attitude toward the new nurses when they were coworkers than when she was acting as charge nurse or preceptor. And, as the record establishes, other senior nurses were more hostile to the new nurses when Antilla was around than they were otherwise. Therefore, she was characterized as the ringleader. It had nothing to do with her complaints about working conditions.

(ALJ Decision, p. 13, lines 27-32).

[6] Most telling was that although the discipline identifies numerous instances of inappropriate behavior, Charging Party Antilla testified that it was only on that one occasion that she was taken out of context. (Jeri Antilla, Trial Transcript, p. 186).

own testimony the condescending manner in which she addressed the lack of a stool. Further, Charging Party Antilla testified that after she addressed this issue personally with the newer nurse, she then felt it necessary to go to the nursing station and share this with everyone present. (Jeri Antilla, Trial Transcript, p. 159). Sharing a newer nurse's issues with others in this manner offers no learning value, only embarrasses the newer nurses. Somehow this made Charging Party Antilla feel more superior.

As to all of the remaining incidents, Charging Party Antilla attempted to claim that "all of those are a fabrication" because she was "not negative, intimidating or a bully." (Jeri Antilla, Trial Transcript, pp. 184-85). Nonetheless, even Charging Party Antilla had to admit that there was not one nurse that she worked with "who would have any reason to make up or fabricate a story" about her. (Jeri Antilla, Trial Transcript, pp. 184-85). Similarly, Ms. Post testified that she did not believe that Tina Wadie had any reason to fabricate a story about Charging Parties Antilla or Brandt. (Lori Post, Trial Transcript, p. 93). Indeed, as to each and every person that raised concerns about her behavior, the Charging Party admitted she had no reason to believe that they would have fabricated a story about her. (Jeri Antilla, Trial Transcript, pp. 187-190). Ultimately, it comes down to numbers: was the Employer to believe the numerous employees that shared specific instances of inappropriate conduct, or the one employee about which the complaints were levied.

Finally, Charging Party Antilla's grievance fails to mention any of the allegations contained in the instant charge. (General Counsel's Exhibit 14, Grievance, p. 4). Instead, the grievance provides:

> Why I am grieving:
>
> > I am grieving this termination as I do not agree with the allegations that I have been charged with. It was stated that I exhibited negative, intimidating and bullying behavior throughout my employment. I have never been counseled on such behavior nor does my yearly evaluation's over the past 6 years reflect such decorum. I think this situation, at most, is due to a personality conflict and statements that were made by myself were taken out of context.

(General Counsel's Exhibit 14, Grievance, p. 4). Charging Party Antilla indicated that this was simply due to a "personality conflict." *Id.* [7] At trial, however, Charging Party could not identify with whom she had a personality conflict. (Jeri Antilla, Trial Transcript, p. 184).

b. Charging Party Brandt was Lawfully Terminated.

Similar to Charging Party Antilla, negative comments about Charging Party Brandt were repeatedly echoed throughout the unit. RNs do not report to Surgical Techs and Charging Party Brandt had no supervisory authority over them. (Deanna Brandt, Trial Testimony, p. 349). Nonetheless, most of the complaints raised involved Charging Party Brandt's condescending tone and nature toward the newer nurses.

At trial, Charging Party did not deny that any of incidents identified in her termination notice occurred. (Deanna Brandt, Trial Testimony, pp. 305-06). Instead, she testified that there was a difference in perspective. (Deanna Brandt, Trial Testimony, p. 253). Charging Party Brandt's perspective was that it was completely acceptable to get an employee's attention by calling "hey, hey", yelling at the nurses because it was loud in the operating room, scolding a nurse for linens in the garbage that were placed there by the resident (and not the nurse), feeling compelled to complain to the charge nurse that a new nurse complained about doing Charging Party's job even though she addressed this issue previously with the nurse personally, questioning the legitimacy of a new nurse who was already being trained for triage, questioning why a new nurse could already be placed on the day shift, denying any one could see her "huffing and puffing" because she had a mask on and finding it acceptable to not help a new nurse even though this was only her second time in the operating room. (Deanna Brandt, Trial Testimony, pp. 261, 292, 293, 295, 296, 346).

[7] Ms. Post, a co-worker and friend of Charging Party Antilla testified that she never witnessed her being intimidating to any of the new nurses. (Lori Post, Trial Transcript, p. 119). As to each and every person that shared a complaint with management about Charging Party Antilla, Ms. Post testified that she was aware of nothing that would make each of these persons make up a story against Charging Party Antilla. (Lori Post, Trial Transcript, pp. 120-22). Ms. Post's bias and testimony is further called into a question given that she too was identified as being a bully, and she knew of nothing that would give them reason to make up a story about her. (Lori Post, Trial Transcript, p. 122).

The other perspective, as outlined by the many complaints reported against Charging Party Brandt, was as follows:

- One nurse described her as a "mean and intimidating person", makes snide comments to her, "felt like Deanna is purposely mean and intimidating to newer staff members." (Respondent's Exhibit 13, Investigation Summaries - 11/7/12 Summary of Meeting between Tonyie Andrews-Johnson and Maggie Fullerton, RN).

- Another nurse shared "[s]he has experienced and witnessed Deanna trying to intimidate and belittle nurses", "rolls eyes and huffs/puffs when asked a question" and could see her behavior as "negatively affect the newer staff members". (Respondent's Exhibit 13, Investigation Summaries - 11/01/12 Summary of Meeting between Tonyie Andrews-Johnson and Jamie Hoffmeister).

- A newer staff member reported that "[h]er only negative experiences have been with Deanna Brandt during c-sections. She stated, it started in orientation and she asked her preceptor if Deanna was always that mean. Her preceptor, Celeste Clark, told her, yes, Deanna is always mean and nasty in the OR and just to ignore it. Alyssa states, Deanna is always yelling at the nurses like they don't know what they are doing or aren't doing it fast enough for her." (Respondent's Exhibit 13, Investigation Summaries - 10/31/12 Summary of Meeting between Tonyie Andrews-Johnson and Alyssa Head).

- Yet another nurse shared several unpleasant experiences in the operating room with Deanna Brandt. "Deanna is not nice to the nurses in the operating room. She yells at the nurses and wants them to do things her way and attend to her requests immediately." (Respondent's Exhibit 13, Investigation Summaries - 10/31/12 Summary of Meeting between Tonyie Andrews-Johnson and Kim Campbell, NRT RN).

- Another co-worker describes Deanna as "mean and nasty" in the operating room. "She doesn't ask for things, she demands that you stop what you are doing and get whatever she needs." (Respondent's Exhibit 13, Investigation Summaries - 10/31/12 Summary of Meeting between Tonyie Andrews-Johnson and Jennifer Aniol).

Examples of Ms. Brandt's negative and uncooperative behavior were too numerous for any employer to believe that it was simply a matter of perception.

Even Charging Party Brandt had to admit that there was not one nurse that she worked with who would have any reason to single her out. (Deanna Brandt, Trial Transcript, p. 306). Further, Charging Party Brandt admitted that she had done nothing that should have given Tina Wadie cause to be angry with her. (Deanna Brandt, Trial Testimony, p. 348). Indeed, as to each and every person that raised concerns about

her, Charging Party Brandt admitted she had no reason to believe that she would have fabricated a story about her. (Deanna Brandt, Trial Transcript, pp. 306-308).

2. The Administrative Law Judge Correctly Found that the General Counsel Did Not to Meet its Burden of Demonstrating Anti-Union Animus or that the Charging Parties' Protected Conduct was a Substantial and Motivating Factor in the Terminations.

Under *Wright Line*, 251 NLRB 1083, 105 LRRM 1169 (1980), *enf'd.*, 62 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 109 LRRM 2779 (1982), the General Counsel has the initial burden of demonstrating that "an anti-union animus contributed to the employer's decision to discharge an employee." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 113 LRRM 2857 (1983). This burden "never shifts. The General Counsel always retains the responsibility to how that employee's protected conduct was a substantial and motivating factor in the adverse action." An employer "may prove that the employee's protected activity was not a substantial and motivating factor in its decision to discharge the employee." *NLRB v. Associated Milk Producers*, 711 F.2d 627, 114 LRRM 2213, 2215 (5th Cir. 1983). Here, the General Counsel did not meet its burden to demonstrate that the "employee's protected conduct was a substantial and motivating factor in the adverse action."

a. The Employer Fostered an Environment to Encourage Open Communications.

The Administrative Law Judge correctly found that the Employer encouraged the staff to discuss their concerns. (ALJ Decision, p. 12, lines 36-37; and Amy Giannosa, Trial Transcript, p. 468). The reason is simple: only if the Employer learns of the issues can it attempt to improve the process or make the environment better. (ALJ Decision, p. 12, lines 37-39; and Amy Giannosa, Trial Transcript, p. 468).

Indeed, time and time again the witnesses testified that the staff was never told that they could not talk to other nurses. (Lori Post, Trial Transcript, p. 90); (Deanna Brandt, Trial Transcript, p. 325; (Amy Giannosa, Trial Transcript, p. 467). Indeed, these same witnesses testified that they were never told that they would be subjected to discipline should they complain about safety or other topics. (Lori Post, Trial Transcript, p. 90); (Dusta Dukic, Trial Transcript, p. 378); (Amy Giannosa, Trial Transcript, p. 469); (Anne Ronk, Trial Transcript, pp. 514, 520-21). In fact, no one had ever been terminated for utilizing any of the

formal complaint mechanisms, registering a complaint with management or sharing a complaint with their co-workers. (Anne Ronk, Trial Transcript, p. 533). Not only was such conduct not prohibited, it was encouraged. (Amy Giannosa, Trial Transcript, p. 473).

An example of this open communication is when Charging Party Brandt testified that she made suggestions to Anne Ronk regarding how to realign the operating room. (Deanna Brandt, Trial Testimony, p. 343). In response, Anne Ronk asked her to sketch an outline of the operating room and these suggestions were eventually put into effect. (Deanna Brandt, Trial Testimony, p. 343); (Anne Ronk Trial Testimony, p. 547).

In fact, the trial testimony identified that there were numerous methods in which the Employer encouraged staff to bring forth their complaints about safety. (Lori Post, Trial Transcript, pp. 90-91 (testified about participating in safety surveys and engagement surveys); (Dusta Dukic, Trial Transcript, pp. 387-389) (testified that you could raise concerns using e-mail, phone, personal conversation, safety survey, Dr. Flanders' Blog, MyVoice, variance reports, or the corporate compliance line); (Anne Ronk, Trial Transcript, ps. 521-532) (identified Culture of Safety Survey, American Nurses Credentialing Center Survey, PSQI report or variance report, MyVoice, compliance line, Beaumont Online feedback form, Dr. Flanders' Blog, Beaumont Online Patient Safety Line, Engagement Surveys); (Amy Giannosa, Trial Transcript, p. 468 (testified about employees coming to Human Resources, their managers or using the Compliance Line, MyVoice, company blog, or variance reports); (Patricia Knudson, Trial Transcript, pp. 639-40, Safety Symposium addressed how to file a PSQI or a variance report). A copy of the Employer's various programs and procedures for sharing input, positive or negative, are set forth in Respondent's Exhibits 17-24.

Even the Hospital President, Shane Cerone, had an unannounced visit to the Family Birth Center during the midnight shift to elicit the staff's input because of the low safety surveys. (Lori Post, Trial Transcript, p. 93); (Respondent's Exhibit 16, March 5, 2012 Family Birth Notes). Notably absent from those discussions were Charging Parties Antilla and Brandt. (Lori Post, Trial Transcript, p. 95). Ms. Post testified that she was "honest with him" and shared her concerns about safety and being short staffed. (Lori Post,

Trial Transcript, pp. 93-94). None of the persons that met with Mr. Cerone were disciplined or terminated for what they shared, even though it portrayed the unit in a poor light. (Anne Ronk, Trial Testimony, p. 520).

Obviously, the Employer was not the type that stifled the sharing of complaints and issues. Instead, it repeatedly strived to get input from its employees. The Administrative Law Judge correctly held that "management witnesses credibly testified, and both Antilla and Brandt agreed, that management did not discourage such conversations among the staff." (ALJ Decision, p. 11, lines 15-16). Finally, there was no evidence that the Employer had any discriminatory animus towards unions or any intention to stifle the discussion of terms and conditions of employment.

b. Other Employees Complained but were not Terminated.

In finding that the Respondent had established that both Antilla and Brandt would have been terminated absent their protected activity, the Administrative Law Judge correctly found that "it has been establish that other nurses who likewise engaged in similar discussions complaining about working conditions, were not terminated." (ALJ Decision, p. 11, lines 18-19). Indeed, if the Employer was truly targeting individuals discussing terms and conditions of employment, then others would have been terminated as well. However, this did not occur. Instead, only two persons were terminated in November 2012: Charging Party Antilla and Charging Party Brandt. These terminations were based upon their misconduct, not for discussing terms and conditions. (General Counsel's Exhibit 4, Plan for Performance Improvement); (General Counsel's Exhibit 5, Plan for Performance Improvement).

Charging Party Antilla testified that she discussed with other employees issues on the floor. (Jeri Antilla, Trial Transcript, p. 191). Specifically, Charging Party Antilla identified that she had such discussions with other nurses, such as Michelle Wonch, Amanda Bristow, and Kristen Kinaia. (Jeri Antilla, Trial Transcript, p. 191). However, as admitted by Charging Party Antilla, none of these persons were terminated. (Jeri Antilla, Trial Transcript, p. 196).

Charging Party Brandt likewise testified that she talked to Michelle Wonch, Jen Anetta, Kristen Kinaia, Cathy Baley, Janelle, Connie Tiensov, Carmella, and Leticia Reed. (Deanna Brandt, Trial Transcript, pp. 246-47). However, Charging Party Brandt admitted that there was no evidence that anyone else had been terminated as a result of complaining. (Deanna Brandt, Trial Transcript, pp. 321-23).

Lori Post, a former co-worker, testified that she had also complained to her fellow employees about the working conditions, such as how the hiring of new nurses impacted her job.[8] (Lori Post, Trial Transcript, p. 74). Specifically, Ms. Post testified that she complained to a variety of individuals including Charging Party Antilla, Mandy Bristow, Kristen Parker, Janelle Daniel, Kristen Kinai, Anne Marie, Celestine, Eric Forman, Valerie Billups, Menka Jovanovski, and Michelle Wonch. (Lori Post, Trial Transcript, pp. 74-75, 88-89). Additionally, Ms. Post testified that she had similar conversations even with the newer staff, such as Dusta Dukic, Nadia and Tina Wadie. (Lori Post, Trial Transcript, p. 75). Indeed, Ms. Post testified that "[j]ust about every nurse that worked prior to the newer nurses had complained about short-staffing." (Lori Post, Trial Transcript, p. 88). Such discussions were commonplace and occurred every weekend they worked. (Lori Post, Trial Transcript, p. 75). Ms. Post testified that she expressed her opinion just as much as Jeri ever did, but she was not fired or disciplined. (Lori Post, Trial Transcript, pp. 114-15).

Being short-staffed or providing more training to new nurses were not new revelations raised for the first time by the Charging Parties. Indeed, for years the unit has been diligently working to increase staffing. (Anne Ronk, Trial Transcript, p. 515). In 2011, 16 more nurses were added to the unit. (Anne Ronk, Trial Transcript, p. 510). None of those added were brand new graduate nurses. *Id.* In 2012, another dozen

[8] General Counsel attempted to elicit testimony from Ms. Post that this less experienced workforce could have somehow affected the Charging Party Antilla's nursing license. (Lori Post, Trial Transcript, p. 77). However, upon further inquiry it was admitted that there was truly no factual or legal basis for this concern. Lori Post (Trial Transcript, pp. 100-01) testified that she not aware of anyone ever losing their license if someone who worked on their patient made a mistake, never saw a regulation that indicated this could happen, never seen it, never read it and it did not happen the one instance when someone died). Further, this does not appear to be a basis for revocation of a Surgical Technologist Certification either. (General Counsel's Exhibit 15, "Certification cards may be revoked for unauthorized possession, falsification of documents, fraud, or ethical misconduct."). Interestingly, Ms. Post admitted she could not recall any specific conversation with her co-workers in which licensing concerns were ever discussed. (Lori Post, Trial Transcript, p. 117).

nurses were added. (Patricia Knudson, Trial Transcript, p. 633). After the Hospital President had an unannounced visit to the midnight shift to discuss safety concerns, three nurses were immediately added. (Anne Ronk, Trial Transcript, p. 535). The Family Birth Center increased its budget by $1,000,000.00 to add 13.4 full-time equivalent nurses. (Anne Ronk, Trial Transcript, p. 535). Due to market conditions, the Employer was forced to hire newer nurses to increase staff levels. This was not the Employer's first choice but was their reality. (Patricia Knudson, Trial Transcript, p. 642). As a result, the Employer took steps to increase the length and the type of training received by those nurses that were new to the unit. In short, the Charging Parties are trying to allege that the Employer fired them for reasons that were already understood and, indeed, agreed with and took action to resolve. (Amy Giannosa, Trial Transcript, p. 467).

Finally, the Administrative Law Judge recognized "that other nurses who likewise engaged in similar discussions complaining about working conditions, were not terminated." (ALJ Decision, p. 11, lines 18-19). Indeed, "of the four who were deemed the primary offenders, only Antilla and Brandt were terminated." (ALJ Decision, p. 11, lines 21-22). While there is no evidence that Wonch was in fact counseled as the management team agreed, that is immaterial, since the decision had clearly been made by the team to counsel her, but not to terminate her.

c. The Employer did not Consider any of the Alleged Concerted Activities by the Charging Parties in its Termination Decision.

In order to find a violation, the law requires a finding that the concerted activity was a motivating factor in the decision to terminate. *NLRB v. McCullough Environmental Svcs.,* 5 F.3d 923, 144 LRRM 2626, 2633 (5th Cir. 1993), *quoting, NLRB v. McEver Eng'g., Inc.,* 784 F.2d 634, 640, 121 LRRM 3125 (5th Cir. 1986). Here, the Administrative Law Judge correctly found that the Employer did not consider any of the alleged concerted activities by the Charging Parties in its termination decision:

- "I accept and credit Ronk's testimony. Ronk testified that when she became aware in October/ November 2012 that Antilla was discussing concerns about staffing with other staff, the fact that she was engaging in such discussions was not of concern to her. (Tr. 514, 536–537.)" (ALJ Decision, p. 12, lines 34-36).

- I accept and credit Andrews-Johnson's testimony that the only things that were considered when making her decision to terminate the two were Wadie's feedback and the input from other new nurses from her investigation. (Tr. 586.) The fact that Antilla and Brandt had discussed their concerns with each other, with her, or with other nurses was not a factor in the decision to termination their employment (Tr. 588–589)." (ALJ Decision, ps. 11-12, lines 46-47 and 01-03).

Instead, the Charging Parties were terminated because of their mean, nasty, intimidating and bullying behaviors. (Amy Giannosa, Trial Transcript, pp. 472-73).

B. The Administrative Law Judge Correctly Held that the Employer's Entire Policy Was Not Unlawful.

After both of the Charging Parties testified, and with only one co-worker left to testify in its case-in-chief, General Counsel sought to amend the Complaint; alleging that one of the Employer's policies was overbroad. (General Counsel's Exhibit 30). Specifically, General Counsel alleged that the Code of Conduct for Surgical Servicers and Perianesthesia "discourage employees from engaging in protected concerted activities".

The Administrative Law Judge found that two of the six work rules (rule 4—"Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and rule 6 part 2—"Behavior … that is counter to promoting teamwork") challenged by the General Counsel violate §8(a)(1). (ALJ Decision, p. 17, lines 35-37). This violation was found despite that "neither Antilla nor Brandt nor any other employee was disciplined for violation of the Code, and no employee actually limited their activities based on the Code." (ALJ Decision, p. 17, lines 38-40). The Employer, although it disagreed with the decision of the Administrative Law Judge, did not file exceptions to this ruling. Instead, the General Counsel filed Exceptions to the Administrative Law Judge's finding that four of the six work rules did not violate §8(a)(1).

The Administrative Law Judge correctly held that the Employer's "Code of Conduct does not explicitly restrict Section 7 activities, nor was it promulgated in response to union activity, nor has it been applied to restrict Section 7 activities." (ALJ Decision, p. 15, lines 22-23). Instead, the Administrative Law Judge opined that the only issue was whether employees would reasonably construe the Code of Conduct to prohibit Section 7 activity." (ALJ Decision, p. 15, lines 24-25). In that regard, the Administrative Law

Judge correctly concluded that "[i]n the instant case, a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities. To find otherwise would ignore the employer's rights in the Lafayette balancing test and consider only potential employee rights." (ALJ Decision, p. 16, lines 42-44). Given the context in which the rules were issued, the Administrative Law Judge ultimately concluded that four of the six rules were lawful:

> The rules are put in context via reference to legitimate business concerns (i.e., patient care, hospital operations, and a safe healing environment), that would tend to restrict their application. I find that a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules.

(ALJ Decision, p. 16, lines 42-44).

In determining whether the maintenance of a work rule violates §8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). The Administrative Law Judge correctly concluded that this standard could not be met.

A policy that violates §8(a)(1) generally has a chilling effect. Here, no such thing occurred. Instead, repeatedly throughout the trial witnesses testified that they regularly exercised their right to discuss with other individuals. (Lori Post, Trial Transcript, p. 74). Indeed, Ms. Post testified that "[j]ust about every nurse that worked prior to the newer nurses had complained about short-staffing." (Lori Post, Trial Transcript, p. 88). Such discussions were commonplace and occurred every weekend they worked. (Lori Post, Trial Transcript, p. 75). Indeed, even Charging Party Antilla admitted that her discussions with her co-workers were constant and ongoing (Jeri Antilla, Trial Transcript, p. 196). Likewise, Charging Party Brandt testified to her repeated discussions with her co-workers as well. (Deanna Brandt, Trial Transcript, pp. 246-

47). There was no any evidence that anyone was chilled in the exercise of their rights to discuss any of these issues.

Indeed, the policy language itself does not provide that you cannot talk about the union or your concerns. (Respondent's Exhibit 6, Policy, Code of Conduct for Surgical Services and Perianesthesia). Instead, the evidence demonstrated that the Employer offered numerous ways for employees to exercise their rights. Indeed, the Employer encouraged employees to exercise their right to bring issues to management and to discuss it among themselves. The Employer even had a 4-hour mandatory training program because it wanted more communication, not less.

Further, there was no testimony whatsoever that the employees could reasonably construe the language to prohibit Section 7 activity. As Dusta Dukic, a newer nurse, described it, is just common sense that you should not bully. (Dusta Dukic, Trial Transcript, p. 386). Indeed, it has been repeatedly held that policies or rules addressing conduct that is reasonably associated with actions that fall outside the Act's protections, such as conduct that is malicious, abusive or unlawful, are permissible. *See, for example, Lutheran Heritage Village-Livonia, supra*, 343 NLRB at 647-649 (rule addressing "verbal abuse," "abusive or profane language," and "harassment"); *Palms Hotel & Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

Finally, there was no testimony to demonstrate that the rule had been applied to restrict the exercise of the employees' Section 7 rights. The rule was not promulgated "in any way to prevent individuals from discussing their concerns in the workplace." (Amy Giannosa, Trial Transcript, p. 470). Nor has it ever been used in that manner. (Amy Giannosa, Trial Transcript, p. 470). Further, it was not put in place as a result of any union activity. (Amy Giannosa, Trial Transcript, p. 470). Finally, this policy has never been interpreted to mean that an employee cannot talk about his/her concerns, talk about the union, talk about union organizations or talk about safety. (Amy Giannosa, Trial Transcript, p. 470).

The purpose of Code of Conduct for Surgical Services and Perianesthesia was "to foster effective working relationships among the employees and physicians, to provide and maintain high quality and safe patient care." (Amy Giannosa, Trial Transcript, p. 471). Discussion fosters effective working relationships. (Amy Giannosa, Trial Transcript, p. 470). Accordingly, "prohibiting people from discussing their concerns or coming to management would not be in line with the intent" of this policy. (Amy Giannosa, Trial Transcript, p. 471). The Employer has no policy which prohibits discussing issues with management or each other. (Anne Ronk, Trial Testimony, p. 521); (Tonyie Andrews-Johnson, Trial Transcript, p. 588). There is also no rule which prohibits discussions about unions or union activity. (Anne Ronk, Trial Testimony, p. 533).

In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998), *enfd. mem.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). Here, the policy at issue does not indicate that an employee cannot discuss, talk or complain. As such, the Administrative Law Judge correctly concluded that the entire policy was not unlawful.

Conclusion

For all of the foregoing reasons, the Employer respectfully requests that the Exceptions filed by the General Counsel be denied.

Respectfully submitted,

/s/ Rebecca S. Davies

John P. Hancock (P23653)
Rebecca S. Davies (P52728)
Butzel Long, a professional corporation
150 W. Jefferson Avenue, Suite 100
Detroit, Michigan 48226
(313) 225-7028
(313) 225-7080 (fax)
hancock@butzel.com
davies@butzel.com

Dated: May 7, 2014

Counsel for Respondent William Beaumont Hospital

CERTIFICATE OF FILING/SERVICE

A copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO EXCEPTIONS was filed electronically on May 7, 2014. A copy was also sent via pdf email to Darlene Haas Awada, Board Attorney at darlene.haasawada@nlrb.gov. Notice of this filing was sent to all parties by operation of the Court's electronic filing system.

/s/ Rebecca S. Davies
Attorney for Respondent

1465665